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Supreme Court of the United States

October Term, 1970

No. 1164

RICHARD A. YAHR, JOSEPH D. MILES, HAL W. NOYES, BRUCE PATTERSON, JOSEPH P. CURTIS, ROBERT HALL, DONALD PERKINS, FREDERIK PENN, JACK K. RILEY, DONALD C. MEHLE, CRAIG G. LEWIS, MICHAEL FLAHERTY, EDWARD V. COX, FELTON C. DONNELL, LEW D. BRICE, WILLIAM K. KINNEL, DAVID G. SHULMAN, and LAWRENCE J. MILANO,

Petitioners,

—against—

STANLEY R. RESOR, as Secretary of the Army, Department of Defense, and Lt. General JOHN J. TOLSON, Commanding General of Fort Bragg, North Carolina,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Laughlin McDonald
17 S. Circle Drive
Chapel Hill, North Carolina
Attorneys for Petitioners

David Rosenberg
Dorian Bowman
Of Counsel

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RICHARD A. YAHR, *et al.*,

Petitioners,

—against—

STANLEY R. RESOR, Secretary of the Army, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on August 27, 1970.

Opinions Below

The opinion of the Court of Appeals, reported at 431 F.2d 690, is appended hereto at pp. 24-26. The order of the District Court denying petitioners' motion for a preliminary injunction was accompanied by enumerated findings of fact and conclusions of law which are appended hereto at pp. 27-32.

Jurisdiction

The judgment of the Court of Appeals was entered on August 27, 1970. The time in which to file this petition was extended to and including December 24, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Were servicemen stationed at Ft. Bragg, North Carolina, denied their First Amendment freedoms of speech, association, and press by the refusal of the District Court to enjoin preliminarily respondents from barring the distribution on the Ft. Bragg installation of petitioners' newspaper, which expressed opposition to the participation of the United States in the Vietnam war, where

1. Respondents failed to make any showing that the newspaper's distribution presented any danger at all to the security of the base or to the discipline of soldiers stationed there;

2. The Army regulations authorizing respondents' actions discriminatorily impose a system of prior restraint solely on petitioners' newspaper and on no other commercial or military publications distributed on base; and

3. The Army regulations lack sufficient standards and procedures to safeguard against arbitrary and capricious suppression of petitioners' newspaper?

Constitutional, Statutory and Regulatory Provisions Involved

Petitioners assert their right to freedom of speech, association and press under the First Amendment to the Constitution.

Respondents claim the power to prohibit distribution of petitioners' newspaper at Ft. Bragg under the following Army and Ft. Bragg Regulations:

5–5. Protection of loyalty, discipline and morale.

a. Objectives. The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. Responsibilities. Installation commanders will encourage and promote the availability to service personnel of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed forces. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7–2*a* AR 335–15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters of Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Ft. Bragg Regulation 210-23

(1) *Purpose.* The purpose of this directive is to establish policies for the control of the distribution of publications on this post.

(2) *General Policy.*

a. The distribution of publications, including pamphlets, newspapers, magazines, handbills, flyers and other printed material on the Fort Bragg Military Reservation will not be made except through regularly established distribution outlets, under appropriate contractual agreements, or as required by law or regulation.

b. The Installation Commander may grant exceptions to the policy contained in this paragraph. Applications for exceptions shall be submitted in writing to the Provost Marshal, this Headquarters, at least seven days prior to the date of the proposed distribution describing the method of distribution proposed and including a copy of the publication or publications involved.

(3) Reference: AR 210-10.

Statement of the Case

Petitioners are servicemen stationed at Ft. Bragg, North Carolina. During their off-duty hours and at their own expense, they publish a newspaper entitled *Bragg Briefs*, principally to voice their opposition to the Vietnam war.

In early 1969, petitioners and other servicement at Ft. Bragg formed an organization known as GI's United Against the War in Vietnam (hereinafter, GI's United). During this period, open and orderly meetings of GI's United were frequently held at several public facilities on base. At these meetings, the petitioners and other servicemen, including among them black Americans and veterans of the Vietnam war, discussed various public issues, and particularly, the war and racial discrimination in the military and civilian society.

In March and April, 1969, GI's United began to solicit signatures from the servicemen at Ft. Bragg for two petitions. One expressed support for servicemen at Ft. Jackson, South

Carolina, who were facing court martial prosecutions for exercising their First Amendment right to speak.[1] The other petition sought permission from respondent Tolson, the base commander, to hold a meeting at Ft. Bragg to protest the war.

During this period, petitioners and other members of GI's United were subjected by respondents to illegal arrests, detentions, and seizures of property. Some lost or were denied security clearances, others were threatened by respondents with courts-martial, duty reassignments and transfers to Vietnam. In addition, on April 20, 1969, respondents promulgated Ft. Bragg Regulation 210-23, see *supra*, at pp. 4-5. This regulation prohibited all non-commercial and non-military publications, namely (at the time) the petitions circulated by GI's United, from distribution on base without the prior approval of respondent Tolson.

On May 19, 1969, petitioners instituted the present action in the Eastern District of North Carolina charging respondents with engaging in a pattern of intimidating and harassing conduct designed to suppress GI's United.[2] Petitioners' motion for summary judgment with supporting affidavits, filed simultaneously with the instant motion for a preliminary injunction on October 6, 1969, is still pending and has not yet been answered by respondents.

Petitioners decided to publish *Bragg Briefs*, at least in part, to publicize the events at Ft. Bragg and the legal action they had commenced.

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1. The events at Ft. Jackson have given rise to the petition for a writ of certiorari in *Dash, et al. v. Resor, et al.*, presently pending before this Court. The arguments made in that petition parallel those made here, and we adopt them as our own.

2. A motion for preliminary injunction against the discriminatory transfer to Alaska of petitioner Joseph Miles, the leader of GI's United, was heard and denied by the district court on June 19, 1969.

The first edition of *Bragg Briefs* was published in July, 1969.[3] As exemplified by the July edition, the style and format of *Bragg Briefs* combines news reporting and editorial commentary with diversified features, including book reviews, poems, nationally syndicated political cartoons and letters to the editor. While its central focus has been on the war, *Bragg Briefs* has also been concerned with racial inequities in the military, and has reported the efforts of servicemen to enforce their freedoms of speech and association through the courts.

On July 4, 1969, pursuant to Ft. Bragg Reg. 210-23, petitioners submitted an application for permission to distribute the July edition by hand in various public areas on the base, including "the main PX, other PXs, cafeterias, service clubs and theaters". (44a).[4] In their application, petitioners gave assurances that distribution would be in "an orderly fashion so as not to interfere, stop or prevent the movement of any other person or vehicle." *(Ibid.)*

Petitioners received no reply until July 18, 1969, when they were advised by the Provost Marshal that "[p]ermission to distribute is delayed pending further consideration." (45a).

No further word had been received by petitioners when, on July 30, 1969, they applied for permission to distribute the August, 1969 edition of *Bragg Briefs*. (46a). Among the special features of this edition was a lengthy article calculating the effect at Fort Bragg of the Military Justice Act of 1969 and this Court's decision in *O'Callahan v. Parker*. The issue also included a review of a book by Hans J. Morgenthau, entitled *A New Foreign Policy for the United States*.

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3. A bound set of the four editions of *Bragg Briefs* involved in this case has been filed with the Clerk of this Court. This exhibit is paginated consecutively SA-1 through SA-32.

4. "a" references are to the Appendix on Appeal filed with the court below.

On August 4, 1969, petitioners were notified that distribution of both the July and August editions was forbidden pending review by "higher headquarters." (49a). More than a month later, on September 15, 1969, both applications were denied without explanation. (49a).

Application for permission to distribute the September and November editions were submitted on September 17, 1969 and October 22, 1969 respectively. (50a, 62a). They sought permission to distribute the issues in the post exchanges and other "regular distribution outlets" refused to by Ft. Bragg Reg. 210-23, in the same manner and displayed with equal prominence as other newspapers and magazines handled by those outlets.[5] These applications were denied in turn on September 22, 1969 and October 27, 1969, without any given explanation. (52a, 66a).

On October 17, 1970, the district judge ordered respondents to show cause why a preliminary injunction should not issue restraining them from enforcing Ft. Bragg Reg. 210-23 and from further prohibiting the distribution of *Bragg Briefs* on base. Respondent Tolson filed an affidavit in opposition dated November 3, 1969, which for the first time, disclosed—in general terms—his reason for banning *Bragg Briefs*. See *infra*, p. 33. He stated that the editions of *Bragg Briefs* he reviewed were "directed specifically to Ft. Bragg soldiers with the express purpose of encouraging them to organize in opposition to the

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5. These distribution outlets, including the base libraries and newsstands in the post exchange, carry military publications and nationally circulated commercial magazines and newspapers, such as the *New York Times*, *Life*, *Newsweek*, *Ebony*, *Esquire*, *True*, *Look* and the *Washington Monthly*. Ft. Bragg Reg. 210-23 exempts these publications from its coverage and Defense Department Directive No. 1325.6 (Sept. 12, 1969) expressly prohibits base commanders from having "specific issues of a publication distributed through official outlets such as the post exchanges and military libraries." (78a).

war in Vietnam." See *infra*, p. 35. On this basis alone, and without further specification, respondent Tolson concluded that distribution of the newspaper at Ft. Bragg "constitute[d] a clear danger to the loyalty, discipline and morale of the military personnel" under his command. *Ibid.*

On November 12, 1969 a full hearing was held, and two months later, on January 3, 1970 the District Court issued an order denying petitioners' motion for a preliminary injunction. Judge Butler ruled that respondent Tolson's decision to bar distribution on the basis set forth in his November 3, 1969 affidavit was reasonable and that AR 210-10, ¶5-5, (supra at pp. 3-4) and Ft. Bragg Reg. 210-23 were constitutionaly valid. See *infra*, p. 31.

The court below affirmed. While it held that servicemen were entitled to exercise their First Amendment rights, including distribution of their newspapers on base, it ruled that the base commander "has primary responsibility for determining the impact of the newspaper on the men in his command." *Infra*, p. 26. Like the district court it made no independent evaluation to determine if there was factual support for the respondent Tolson's conclusions. The court concluded that the district court had therefore not "abused its discretion" in denying a preliminary injunction. *Ibid.*

Reasons for Granting the Writ

1. The issues presented in this case are of immediate concern and great importance. At stake here is the right of millions of our citizens to continue to exercise their First Amendment freedoms *after* military induction, to speak, publish, associate together and disseminate their views on matters of governmental policy.

Petitioners, who are stationed in the United States, assert, in particular, their right to engage in the most basic

form of political communication, publication and distribution of a newspaper (see *Lovell v Griffin*, 303 U.S. 444, 451-452) and to express their views on a governmental policy of paramount public concern, United States participation in the Vietnam war. Respondents have banned petitioners' newspaper from the streets and newsstands at Ft. Bragg, self-styled as the "fifth largest city in North Carolina," where petitioners and over 120,000 military personnel and their families live and work.[6] Refusal by the courts below to grant prompt relief from this ban sustains a wholly unjustified and discriminatory prior restraint on *Bragg Briefs'* distribution, which has for this or any newspaper the practical effect of a total restraint.

In the military, as in the nation's civilian society, opposition to the war is wide spread and increasing.[7] Newspapers, similar in format and style to *Bragg Briefs*, are published by

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6. A brief history of Ft. Bragg published by respondents contains the following data on the base:

> "Fort Bragg today is far removed from its modest beginnings in 1918. The Post ranks as the fifth largest city in North Carolina. The reservation comprises over 135,000 acres, with a military population of roughly 50,000. Dependents number about 51,000, civilian workers over 5,000, and retired personnel and their families about 10,000. Thus, all told, Fort Bragg serves approximately 120,000 people."

7. It was to be expected that servicemen would join other citizens from every walk of life in expressing their opposition to the Vietnam War. See *New York Times Magazine*, p. 32 (Feb. 22, 1970); *id.* at p. 25 (May 18, 1969); *New York Times*, p 22, col. 3 (Apr. 28, 1969); *Life*, p. 28 (May 23, 1969); *Newsweek*, p. 18 (Aug. 31, 1970).

The "growth in dissent among military personnel" prompted the Adjutant General of the Army to issue a "Guidance on Dissent" dated May 28, 1969, reaffirming the soldier's "right to express opinions on matters of public and personal concern . . . "

servicemen at practically every military base in the country.[8] The events at Ft. Bragg, therefore, only exemplify the inevitable conflict between servicemen and their superiors over the soldier's right to speak, which this Court will necessarily be called upon to resolve.[9]

This Court has been increasingly vigilant in recent years in the protection of First Amendment rights, and especially so in cases, such as the present one, involving suppression or censorship of Vietnam war dissent. For example, see *Tinker v. Des Moines School Dist.*, 393 U.S. 503; *Schacht v. United States*, 398 U.S. 58; *Bond v. Floyd*, 385 U.S. 116. These decisions recognize the necessity of opening the avenues of dissent to their maximum for *all* citizens, particularly since the legitimacy of the war is a question which apparently has been relegated solely to the political arena. See *Massachusetts*

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8. The "Guidance on Dissent," see *supra*, ftn. 7 acknowledges that the publication of what it terms "underground newspapers" by "soldiers off-post, on their own time, and with their own money and equipment is generally protected by the First Amendment's guarantees of freedom of speech and freedom of the press." See also Department of Defence Directive No. 1325.6 (Sept. 12, 1969) (hereinafter "DoD No. 1325.6").

9. The recent attempts by servicemen to exercise their First Amendment rights to dissent have resulted in numerous court-martial convictions which are at various stages of military and civilian judicial review, as well as affirmative federal actions similar to the present case. See e.g. *Noyd v. Bond*, 395 U.S. 683; *Dash v. Resor*, *supra*; *Cheparro v. Resor*, 412 F.2d 443 (4th Cir. 1969); *Levy v. Corcoran*, 389 F. 2d 929 (D.C. Cir. 1967); *Locks v. Laird*, 300 F. Supp. 915 (N.D.Cal. 1969); *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 151 (1970); *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); *In re Brown*, ____ F. Supp. ____ (E.D. Mich. 1970), 3 SSLR 3404.

A sharp conflict between servicemen and their superiors has arisen over the publication and on-base distribution of newspapers. See e.g.

v. Laird, ____ U.S. ____, 39 U.S. Law Week, 3196 (Nov. 10, 1970); *Mora v. McNamara*, 387 F. 2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934.

This case is perhaps the most poignant and pressing to reach the Court, since petitioners, neither children nor actors in a skit, are servicemen who dissent from a war policy which may take their lives and which, for many, may result in the perpetuation of the poverty and racial inequities which singled them out for induction in the first place. See *Levy v. Parker*, 396 U.S. 1204, 1205; *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), *aff'd* 393 U.S. 316; Davis and Dolbeare, *Selective Service: Present Impact and Future Prospects*, 1967 Wis. L. Rev. 892.[10]

2. Despite the contemporary setting of this case, the governing principles are those enunciated by this Court in a long series of decisions dealing with the inveterate conflict between government policy-makers and dissenters. See *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233; *Schneider v. State*, 308 U.S. 147; *United States v. Robel*, 389 U.S. 258.

United States v. Priest, Navy Court-Martial No. 70,232, *Avrech v. Secretary of the Navy*, (D.D.C. 1970), Civ. Act. No. 3664; *Witryk v. Rafalko*, (S.D. Ohio 1970), Civ. No. 3968.

Related problems are constantly arising with respect to the rights of civilian employees of the military, and civilians generally to express their opposition to the war on military bases in the United States. See *Committee to Free the Ft. Dix 38 v. Collins*, 429 F. 2d 807 (3rd Cir. 1970); *Klinkle v. Nichols* ____ F. 2d ____ (7th Civ. 1970) (*en banc*), 39 U.S. Law Week 2089; *United States v. Bradley*, 418 F. 2d 688 (4th Cir. 1969); *Goldwasser v. Brown*, 417 F. 2d 1169 (D.C.Cir. 1969). Also closely related are cases involving dissent by Selective Service registrants who stand at the threshold of military service; see e.g. *Oesterreich v. Selective Service System*, 393 U.S. 233; *United States v. O'Brien*, 391 U.S. 367; *NSA v. Hershey*, 412 F. 2d 1103 (D.C. Cir. 1969); cf. *Murray v. Vaughn*, 300 F. Supp. 688 (D.R.I. 1969).

10. *Brief* is not confined to the war issue but ranges broadly over problems of poverty and racism which are integrally related to the

There is no constitutional provision or decision of this Court that would sanction the censorship imposed on petitioners merely because they are soldiers who seek to distribute their newspaper on base. Cf. *Pickering v. Board of Education*, 391 U.S. 563; *Tinker v. Des Moines School Dist., supra; Scoville v. Board of Education*, 425 F. 2d 10 (7th Cir. 1970) *cert. denied*, ____ U.S. ____, 39 U.S. Law Week 3141 (Oct. 11, 1970); *Muller v. Conlisk*, 429 F. 2d 901 (7th Cir. 1970).

The power of Congress to make rules for the Armed Forces, or of Congress and the Executive to exercise the war power, does not make military authorities the supreme arbiters of the constitutional rights of servicemen. Indeed, the contrary is plainly apparent from the decisions of this Court. The power of Congress under Art. I, §8, Cl. 14, said the Court in *O'Callahan v. Parker*, 395 U.S. 258, 273, "is to be exercised in harmony with express guarantees of the Bill of

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Government's prosecution of the war. The paper therefore speaks directly to a very large number of servicemen who were, because of their poverty and/or their race, compelled to join the military. Particularly galling to these servicemen are recent decisions by their President and Commander-in-Chief to veto housing, education, health and job corps legislation, to cut the budget for Office of Economic Opportunity projects, particularly legal assistance, to retreat on the judicial battle for school desegregation while offering no legislative alternatives, and to inject overriding political considerations into federal legal assistance, civil rights and conservation programs. Moreover, to many of these servicemen the Administration has appeared to be indifferent to pleas for aid to the nation's cities and urban ghettos. At the same time, the Administration has initiated military incursions into Cambodia, Laos and North Vietnam, and fought desperately for money for the SST and the ABM. The servicemen at Ft. Bragg who publish and read *Bragg Briefs* must be free to debate these issues as vehemently as other citizens, because they will not be—and have a right not to be—governed by default.

Rights."[11] *Cf. Williams v. Rhodes*, 393 U.S. 23, 29; *United States v. Robel*, 389 U.S. 258, 264-265; *Schneider v. State*, 308 U.S. 147, 161. Even assertion of the war power or of the necessities of national security and defense cannot "remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426; see also *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156; *United States v. Robel, supra*, at 264-265; *Youngstown Co. v. Sawyer*, 343 U.S. 579, 589, *Dennis v. United States*, 341 U.S. 494, 520 (Mr. Justice Frankfurter concurring).

Certainly, servicemen, particularly those stationed in the United States, are entitled to uncensored information concerning public issues so that they can vote and exercise their other prerogatives of citizenship intelligently. To secure this right, servicemen are entitled, as are all citizens, to the "preserv[ation] of an untrammeled press as a vital source of public information." *Grosjean v. American Press Co., supra* at 250; *Overseas Media Corp. v. McNamara*, 385 F. 2d 308, 315, n. 12 (D.C. Cir. 1967); *cf. Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390.

The military may not seek to build the morale of soldiers by keeping them in ignorance of, or by limiting their exposure to, the complete spectrum of views on the war issue.[12] *Cf. Tinker v. Des Moines School Dist., supra* at 511;

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11. See also *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

12. Servicemen have long been treated as a captured audience by their military superiors. They have been constantly subjected to political indoctrination by their commanders and through the military's press and other information media. For example, military officials have characterized "Stars and Stripes" as a "house organ" designed to be an instrument of "command information" for building morale. See *New York Times*, p. 1, col. 5 (Jan. 5, 1970). [continued]

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-641. This means that for servicemen in the United States the debate on this or any other public issue should be no less uninhibited, robust or wide open than that of other citizens. Cf. *New York Times v. Sullivan*, 376 U.S. 254, 270; *Garrison v. Louisiana*, 379 U.S. 64, 74-75.

If it is to be otherwise, this Court must say so only after considered argument and briefing on what would be an unprecedented point of departure from its prior decisions.

3. Over the years, the Court has been presented with countless schemes for restricting the communication of dissent. Yet there has been a constant theme throughout. In each case, the Government sought to suppress the most vulnerable of its critics, particularly those over whom it had some additional measure of control through licensing or employment relationships.

The present case does not depart from this theme. The *New York Times, Newsweek, Esquire, Time* and other nationally circulated, commercial publications are freely distributed at Ft. Bragg, despite the fact that many of these publications have been unceasing and harsh in their criticism of the military and the Government's war policy. While these commerical publications may be more sophisticated than *Bragg Briefs*, their message, purpose and impact are the same. It is

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Servicemen, like all other citizens, also have been bombarded by what Senator J. William Fulbright recently described as "a multi-million-dollar-a-year public relations effort to make the military look good." *Ibid.* See also Fulbright, *The Pentagon Propaganda Machine* (1970). As we have seen in connection with the massacre at My Lai in 1968, the military's "information program" operates by suppression of information as well as by its calculated release. See *New York Times*, p. 1., col. 1 (Mar. 18, 1970). See also Minor, *The Information War* (1970); Shearer, *The Brass Image*, Nation (Apr. 20, 1970); Goulden, *Truth is the First Casualty: The Gulf of Tonkin Affair – Illusion and Reality* (1969).

unthinkable that these powerful, commercial publications would be censored or barred from the Ft. Bragg newsstands and, of course, they are not. Only the servicemen's publication, *Bragg Briefs*, is banned.

This Court has never sanctioned this form of invidious discrimination practiced by Government against those who express views which are not officially approved. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157-158; *Red Lion Broadcasting Co. v. F.C.C.*, *supra*; *Tinker v. Des Moines School Dist.*, *supra* at 511; *Street v. New York*, 394 U.S. 576, 592; *Thornhill v. Alabama*, 310 U.S. 88; see also *Brooks v. Auburn University*, 412 F. 2d 1171, 1172-1173 (5th Cir. 1969); *Channing Club v. Board of Regents of Texas Tech. Univ.*, 317 F. Supp. 688, 690, 692 (W.D.Tex. 1970); *Danskin v. San Diego Unified School Dist.*, 171 P. 2d 885, 892-893 (Cal. S. Ct. 1946). The *orderly* distribution of a newspaper voicing *lawful* dissent at Ft. Bragg, particularly in public areas set aside for this very purpose [i.e. "authorized distribution outlets," Ft. Bragg Reg. 210-23(a)] cannot be barred any more than it could be in other government facilities. See *Scoville v. Board of Education*, *supra*; *Jeanette Rankin v. Chief*, 421 F. 2d 1090 (D.C. Cir. 1969); *Wolin v. Port of New York Authority*, 392 F. 2d 83 (2d Cir. 1968); *Dorfman v. Meisner*, 430 F. 2d 558 (7th Cir. 1970); *Overseas Media v. McNamara*, *supra*; *United States v. Bradley*, *supra*, and cf. *Tucker v. Texas*, 326 U.S. 517.

4. The recognition given to the First Amendment rights of servicemen by the court below is made illusory by its refusal to grant prompt interim enforcement of petitioners' rights. For servicemen, as much as for other citizens, "[a]ny delay in the exercise of First Amendment rights constitutes an irreparable injury". *A Quaker Action Group v. Hickel*, 421 F. 2d, 1111, 1116 (D.C. Civ. 1969). See also *Dombrowski v. Pfister*, 380 U.S. 479, 489; *Shuttlesworth v. Birmingham*, *supra*

at 162-163 (Mr. Justice Harlan concurring). This is unquestionably true in the case of a newspaper expressing views on political matters of immediate public concern. *See Carroll v. Princess Anne*, 393 U.S. 175, 182; *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (Mr. Justice Harlan dissenting).

Both the absence in the record of any evidence to support the decision below and the process by which that decision was reached make review by this Court imperative. Otherwise, if left to stand without further consideration, the cursory treatment of petitioners' rights by the court below will be regarded as a signal, in this and other cases, that the First Amendment rights of servicemen are not to be accorded the expeditious judicial protection which this Court has held to be due those rights when exercised by other citizens.

a. There is a fatal defect in the process by which the court below reached its decision. Instead of independently evaluating the substance of respondent Tolson's conclusion that *Bragg Briefs* created an immediate danger to military loyalty, discipline and morale by encouraging servicemen to organize against the war, the court below deferred completely to respondent's unelucidated judgment on the matter.

This is irreconcilable with the decisions of this Court which make clear that the "primary responsibility for determining the impact" of *Bragg Briefs* on the men at Ft. Bragg is lodged with the federal courts and not, as the court below held (*infra*, p. 26) with the base commander. *See Wood v. Georgia*, 370 U.S. 375, 386-389; *Tinker v. Des Moines School Dist., supra*; *Thornhill v. Alabama*, 310 U.S. 88, 95-96; *Schneider v. State*, 308 U.S. 147, 161; cf. *Fiske v. Kansas*, 274 U.S. 380, 385-386. This Court has always met its responsibility despite the pressure of governmental assertions that speech by a particular person or on a particular subject or in a particular place endangered national security. *See United States v. Robel*, 389 U.S. 258, 264; *Schneider v. Smith*, 390

U.S. 17; *Aptheker v. Secretary of State*, 378 U.S. 500. Similarly respondents' expertise in managing military affairs "does not qualify them to resolve First Amendment issues, the traditional province of the judiciary." *A Quaker Action Group v. Hickel*, *supra* at 1118; *cf. O'Callahan v. Parker*, *supra* at 266; *Toth v. Quarles*, 350 U.S. 11, 17-18. See also *Dash v. Resor*, *supra*, Petition, pp. 12-13.

While a motion for a preliminary injunction does not call for a full trial on the merits, nevertheless it may not be disposed of, particularly in First Amendment cases, until the federal court has assured itself that the government's conclusions "rest upon solid facts and a realistic appraisal of the [asserted] danger." *A Quaker Action Group v. Hickel*, *supra*, at 1117. To uncritically accept respondent Tolson's undocumented and unspecified conclusions, as the court below did, impermissibly gives to the military censor the last word on the serviceman's right to speak.

b. Respondents, relying on the Tolson affidavit, contend that distribution of *Bragg Briefs* at Ft. Bragg poses an immediate danger to military discipline and security. But nowhere in the record is there evidence to support this conclusion or, indeed, a finding of any danger.

The Tolson affidavit does not refer to a specific article or series of articles as manifesting the asserted danger. Rather, respondent Tolson finds the danger to arise solely from what he considered to be the newspapers' "express purpose of encouraging [Ft. Bragg soldiers] to organize in opposition to the war in Viet Nam." *Infra*, p. 36. But, again, no specific portions of the paper are cited in the affidavit to support this finding. Nor does the affidavit give any indication of *how* encouraging servicemen to organize against the war would interfere with military security or discipline.

Contrary to the ruling below, the record in this case is not in any respect incomplete. Petitioners' right to a preliminary injunction appears plainly from the uncontroverted evidence in the record. Cf. *Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966) cited with approval in *Tinker v. Des Moines School Dist.*, *supra*; *A Quaker Action Group v. Hickel*, *supra*. This evidence demonstrates that off-base distribution, which has been largely unimpeded, has never resulted in any instances of actual or even potential interference with security or discipline at Ft. Bragg. *Bragg Briefs* has been mailed and carried onto the base, where it has been openly possessed and read. Respondents have never attempted, nor have they ever claimed a need to restrict these activities. Moreover, it is clear from the evidence that neither the mailing, carrying, possessing or reading of *Bragg Briefs* on base has resulted in even a single incident of interference with military operations. Moreover, unrestricted on-base distribution of commercial publications voicing anti-war dissent has not caused any danger to security or discipline at Ft. Bragg.

In the light of these facts, respondents' claim of danger rapidly disappears. Since, as respondents concede, security and discipline are not endangered when a serviceman obtains his copy of *Bragg Briefs* through the mail or from an off-base distributor, there is no rational basis for apprehending danger if the serviceman were to obtain his copy from a PX newsstand or post library.

Even assuming, *arguendo*, that encouraging servicemen to organize in opposition to the war is the purpose of *Bragg Briefs*, we fail to understand how such a lawful purpose can constitute a legitimate basis for the paper's suppression. Certainly, servicemen who, like other citizens, are entitled to vote and express their views on matters of public concern

may not be dispossessed of the concomitant, fundamental right of association. *See United States v. Robel, supra* at 263; *see also* Guidance on Dissent, *supra*, §5.[13]

Bragg Briefs is published in the historical tradition of those politically dissident newspapers which inspired the freedom of press guarantee of the First Amendment. *Grosjean v. American Press, supra* at 244-249. It is both informative and polemical. *Bragg Briefs* concededly, and quite understandably, contains harsh criticism of the military as an institution and of the Government's war policy. Since it is designed to communicate with servicemen, it often makes its points in barracks language, or what Mr. Justice Steward termed, "rhetorical hyperbole, a vigorous epithet." *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 13-14; *see also Garrison v. Louisiana, supra* at 75, 77-79. But it does not incite, urge or even remotely suggest disobedience of orders or breaches of security. Cf. *Bachellar v. Maryland*, 397 U.S. 564; *Brandenburg v. Ohio*, 395 U.S. 444.

It cannot be doubted that the vehement criticism of the war contained in *Bragg Briefs* displeases and may even shock respondents. But the impact of *Bragg Briefs* on the servicemen at Ft. Bragg must be judged in light of the fact that the men have been and are constantly exposed to such expressions of dissent. Cf. *Scoville v. Board of Education, supra* at 14-15. They have been inducted from a civilian society rife with opposition to the war, and are stationed in the United States

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13. The court below remanded the case to the District Court with instructions that respondents specify the articles in *Bragg Briefs* which they deem detrimental. But such specification is entirely irrelevant. Association in opposition to the war is lawful and poses no danger to military operations at Ft. Bragg no matter how many articles might be specified in which such association is encouraged.

where anti-war marches and rallies are held in every major city and college campus; indeed, several have been held just outside the gates of Ft. Bragg, in Fayetteville, North Carolina. Moreover, anti-war views are conveyed to them through commercial publications, distributed without restriction on base, and radio and television broadcasts which freely penetrate the confines of Ft. Bragg.

Respondents may genuinely believe that the dissent expressed in *Bragg Briefs* is inimical to military operations. But in our system, as this Court has made clear, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." *Tinker v. Des Moines School Dist.*, *supra* at 508.[14] Indeed, if there is a danger evidenced by this record, it is the "type of 'danger' . . . envisioned by the founders in presenting the First Amendment for ratification. 'Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth.' " *Wood v. Georgia*, *supra* at 388.

5. The court below upheld, without comment, the requirement that publications by servicemen must be submitted to the commanding general for his approval before they may be distributed on base. If this Court refuses to review this ruling, it will leave standing a system of prior restraint on newspapers which has no precedent in our history. See *Grosjean v. American Press*, *supra* at 249-251.

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14. Respondents may not rationally presume that servicemen who dissent from the government's war policy will not obey orders. "Unquestionably", as the Guidance on Dissent, *supra* § 7, states, "the vast majority of service members are prepared to do what is required of them to perform that mission, whether or not they agree in every instance with the policies the mission reflects."

It will be noted that respondents have not even alleged that there is an overriding military necessity to justify their reliance upon a system of prior restraint to protect security and discipline. Indeed, respondents have never shown why they could not rely, in order to protect discipline, upon the plethora of criminal and disciplinary sanctions available to punish those who advocate unlawful conduct. In the absence of a showing of overriding military necessity, respondents have failed to overcome the presumption against prior restraint and in favor of methods having a less drastic impact on the exercise of First Amendment rights. See *Carroll v. Princess Anne, supra* at 181; *United States v. Robel, supra* at 268; *Wood v. Georgia, supra* at 388-389.

Even when systems of prior restraint have been upheld (although never in a case involving a newspaper) this Court has insisted upon certain substantive and procedural safeguards notably lacking in the present regulations. See *Carroll v. Princess Anne, supra; Shuttlesworth v. Birmingham, supra; Interstate Circuit v. Dallas*, 390 U.S. 676; *Staub v. Baxley*, 355 U.S. 313; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (Mr. Justice Frankfurter concurring).

a. Ft. Bragg Reg. 210-23 is void because it does not contain any substantive standards circumscribing the discretionary power of the commanding general. See *Kunz v. New York*, 340 U.S. 290. The regulation is not saved by assuming that it incorporates the "clear danger to military loyalty, discipline or morale" standard set forth in AR 210-10 ¶ 5-5(c). This standard is no less vague than those invalidated in *Shuttlesworth v. Birmingham, supra; Staub v. Baxley, supra;* and *Gelling v. Texas*, 343 U.S. 960.

b. Ft. Bragg Reg. 210-23 also is defective in placing upon the person submitting the printed material the burden of proving that the material is within the protection of the First

Amendment. Such a burden was explicitly condemned in *Friedman v. Maryland*, 380 U.S. 51, 58. See also *Speiser v. Randall*, 357 U.S. 513, 526.

c. The regulation also fails to guarantee prompt administrative and judicial review of the installation commander's decision prohibiting distribution. See *Carroll v. Princess Anne, supra; Friedman v. Maryland, supra* at 58. The decision of the court below, although recognizing that the District Court had power to review the decision of the installation commander, places no time limit within which this review must be accomplished. The harm caused by the lack of a prompt review can be seen in the instant case, where petitioners' July 4 and July 30 requests for distribution rights were not determined for two months.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Laughlin McDonald
17 South Circle Drive
Chapel Hill, North Carolina

Attorneys for Petitioners

David Rosenberg
Dorian Bowman
Of Counsel

Dated, December 22, 1970

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 14,423

RICHARD A. YAHR, et al,

Appellants,

v.

STANLEY R. RESOR, Secretary of the Army, et al,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Algernon L. Butler, District Judge.

(Argued June 2, 1970 Decided August 27, 1970)

Before BOREMAN and BUTZNER, Circuit Judges, and WIDENER, District Judge.

PER CURIAM:

Appellants are servicemen stationed at Fort Bragg, North Carolina. During their off duty hours they publish a newspaper, "Bragg Briefs," which has been distributed to servicemen off the base. Pursuant to Army and Fort Bragg regulations, they

submitted timely applications for permission to distribute "Bragg Briefs" at various public areas on the military reservation. The Commanding General denied each application on the grounds that the publications constituted a clear danger to the loyalty, discipline and morale of the military personnel under his command.* They now appeal from the refusal to grant a preliminary injunction against interfering with the distribution of the newspaper on the base.

The district court found that the evidence failed to show either a probability of plaintiffs' ultimate success on the merits or a clear denial of plaintiffs' constitutional rights. In the present posture of the case, we need only consider whether the action of the district court was a clear abuse of discretion. Meiselman v. Paramount Film Distributing Corp., 180 F.2d 94 (4th Cir. 1950).

As a basic proposition, servicemen are entitled to the protections of the Bill of Rights, except where military exigencies, such as security and discipline, by necessary implication restrict their applicability. United States v. Jacoby, 11

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* Standards for controlling the distribution of publications are set forth in Army Regulation AR 210-10, ¶ 5-5, which provides in part:

> "[I]nstallation commanders will not, except as provided in this paragraph; take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens."

A Guidance on Dissent, issued by the Office of the Adjutant General, Department of the Army, May 28, 1969, emphasizes that "a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges."

USCMA 428 (1960). Within the military establishment, and under the regulations in question, the commanding officer has primary responsibility for determining the impact of the newspaper on the men in his command. Clearly the district judge did not abuse his discretion in refusing to grant the preliminary injunction. In so holding, of course, we express no opinion on the merits of the case.

Constitutional questions should be decided only when unavoidable, and this is particularly true when the issue is raised on appeal from an interlocutory order. When the case is heard on the merits, the parties should brief, and the district judge should decide, the appropriate standard of review of the Commanding General's decision. The district court should also find which articles, specifically, constituted a basis for the decision to exclude and why the Commanding General deemed them "a clear danger to the loyalty, discipline and morale" of the military personnel at Fort Bragg. Only upon a complete record supplying these facts can it be determined whether the Commanding General had a proper basis for denying the applications, whether he acted consistently with Army directives, and, ultimately, whether his actions deprived appellants of their First Amendment rights.

The order denying the application for a preliminary injunction is affirmed and the case remanded for further proceedings.

Findings of Fact, Conclusions of Law and Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 876 – CIVIL

RICHARD A. YAHR, et al,	FILED
Plaintiffs,	January 3, 1970
	Algernon L. Butler
v.	U.S. District Judge
	E.D.N.C.
STANLEY R. RESOR, as Secretary of the Army, Department of Defense, and Lt. Gen. JOHN J. TOLSON, Commanding General of Fort Bragg, North Carolina,	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Defendants.	

This cause having come on to be heard pursuant to an order issued to the defendants to show cause why plaintiffs' motion for a preliminary injunction should not be granted, and the court having considered affidavits and legal memoranda submitted by both parties and having heard argument of counsel in chambers on November 12, 1969 at Clinton, North Carolina, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs are servicemen stationed at Fort Bragg, North Carolina, and some or all of them are members of G.I.'s United Against the War in Viet Nams.

2. Plaintiffs seek a declaration of their constitutional rights, particularly their rights under the First Amendment, to distribute on the Fort Bragg Military reservation a publication known as "Bragg Briefs" in opposition to the war in Viet Nam, and further seek injunctive relief.

3. That the parties are in dispute concerning their respective legal rights.

4. Plaintiffs and other members of a class of servicemen similarly situated have, during their off duty hours, published a newspaper entitled *Bragg Briefs*.

5. Thus far, four issues of *Bragg Briefs* have been published and are dated as follows: July 4, 1969; August 1969; September 1969; and November 1969.

6. These issues have been distributed by the plaintiffs free of charge to servicemen in Fayetteville, North Carolina, and in other places near Fort Bragg.

7. Plaintiffs have submitted timely applications to the defendants through the Provost Marshall for permission to distribute the particular issues of *Bragg Briefs* by hand at various public areas on the Fort Bragg Military reservation pursuant to Army Regulations and Fort Bragg Regulations, but each application was denied.

8. Army Regulation AR 210-10, paragraph 5-5, Protection of loyalty, discipline and morale, reads in pertinent part as follows:

> a. *Objectives* The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the

same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. *Responsibilities.* Installation commanders will encourage and promote the availability to service personnel of books, periodicals and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed forces. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

c. *Restrictions on disseminations of publications.* It it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

* * * *

e. ***Distribution outlets.*** An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. * * *

9. Fort Bragg Regulation 210-23 is as follows:

(1) *Purpose*. The purpose of this directive is to establish policies for the control of the distribution of publications on this post.

(2) *General Policy*.

a. The distribution of publications, including pamphlets, newspapers, magazines, handbills, flyers and other printed material on the Fort Bragg Military Reservation will not be made except through regularly established distribution outlets, under appropriate contractual agreements, or as required by law or regulation.

b. The Installation Commander may grant exceptions to the policy contained in this paragraph. Applications for exceptions shall be submitted in writing to thy Provost Marshal, this headquarters, at least seven days prior to the date of the proposed distribution describing the method of distribution proposed and including a copy of the publication or publications involved.

(3) Reference: AR 210-10.

10. That John J. Tolson, the Commanding General at Fort Bragg, (Military population 51,734) personally examined each of the four issues of *Bragg Briefs* submitted to him for approval

and gave consideration to its impact on the effectiveness of his command, the accomplishment of the military mission, and on the loyalty, discipline, and morale of the servicemen at Fort Bragg in accordance with the standards prescribed in Army Regulation 210-10, and Department of Defense Directive 1325.6, and determined that said publications were directed specifically to Fort Bragg soldiers with the express purpose of encouraging them to organize in opposition to the war in Viet Nam; that permission to distribute the publications was denied on the grounds that their contents constitute a clear danger to the loyalty, discipline, and morale of the military personnel under his command.

CONCLUSIONS OF LAW

1. That Army Regulation AR 210-10, paragraph 5-5, and Fort Bragg Regulation 210-23 promulgated pursuant thereto, are consitutionally valid.

2. That said issues of *Bragg Briefs* constitute a basis upon which the Commanding General at Fort Bragg could reasonably conclude that the distribution of said publications presented a clear danger to the military loyalty, discipline, and morale of the military personnel at said installation.

3. That the evidence fails to show a probability of plaintiffs' ultimate success on the merits, nor does it clearly establish that plaintiffs are being denied a constitutional right.

Upon the foregoing findings of fact and conclusions of law, it is

ORDERED that the application for preliminary injunction is denied.

Findings of Fact, Conclusions of Law and Order of the District Court

This 2nd day of January, 1970.

Algernon L. Butler

CHIEF JUDGE

UNITED STATES DISTRICT COURT

Tolson Affidavit

I, John J. Tolson, Lieutenant General, U.S. Army, being under oath do hereby state that I am the Commanding General, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina.

The major units assigned to XVIII Airborne Corps or located at Fort Bragg include the XVIII Airborne Corps, XVIII Airborne Corps Artillery, 12th Support Brigade, 82d Airborne Division, U.S. Army John F. Kennedy Center for Military Assistance, the United States Army Training Center, Infantry, the 35th Signal Group, 11th Military Police Group, 50th Signal Battalion, the Third, Sixth and Seventh Special Forces Groups and Womack Army Hospital Specialized Treatment Center. The Fort Bragg Military Reservation encompasses 130,715 acres of land, the military population of Fort Bragg is 51,734 with 14,294 dependents of servicemen residing on the installation.

As the Commanding General of XVIII Airborne Corps and the Fort Bragg Military Installation, I am responsible for the contingency planning and training of assigned units so as to insure that operationally ready forces are available for employment anywhere competent authority may direct. The U.S. Continental Army Command has provided XVIII Airborne Corps with special augmentation to accomplish Army forces employment planning for United States Strike Command and United States Atlantic Command. This responsibility includes providing strategically mobile, centrally located forces designed to respond on short notice to meet a variety of threats and deal with diverse situations in widely varying locations. It is from this requirement that XVIII Airborne Corps derives its mission to move by air on short notice to any part of the world prepared to fight upon arrival. In order to accomplish this mission, XVIII Airborne Corps maintains selected units in a state of advanced readiness.

Since 1964, 209 units with a total strength of 19,000 troops have been trained, readied and deployed to Southeast Asia. This does not include military personnel who have departed this installation on individual basis enroute to Viet Nam. During the months of July, August and September 1969, 3,012 officer and enlisted personnel departed this station for eventual assignment to Viet Nam. Since July 1966, 160,000 soldiers received their basic training at Fort Bragg, a substantial number of whom were assigned to Southeast Asia upon completion of advanced training. The trainee population of the U.S. Army Training Center at this time is 10,350.

On 4 July 1969 application was made to my command for permission to distribute a publication entitled "Bragg Briefs". (See Exhibt A of Plaintiffs' Affidavit) This application was submitted in accordance with AR 210-10 and Fort Bragg Regulation 210-23. After review of the publication it was my opinion that distribution would constitute a clear danger to the loyalty, discipline, and morale of military personnel at Fort Bragg and that permission to distribute should accordingly not be granted. Before denying permission, however, I requested my staff to obtain further guidance of Headquarters, Department of the Army.

On 3 August 1969 application was made to this command for permission to distribute the August 1969 issue of "Bragg Briefs". (See Exhibit B of Plaintiffs' Affidavit) After review of this edition I once again was of the opinion that distribution should not be permitted because its contents constituted a clear danger to the loyalty, discipline, and morale of the military personnel of my command. On 4 August 1969 guidance was again requested of Headquarters, Department of the Army.

By reply dated 13 August 1969, forwarded through the Commanding General, U.S. Continental Army Command, Fort

Monroe, Virginia, and the Commanding General, Third U.S. Army, Fort McPherson, Georgia, I was informed that appropriate action on these applications could be taken by my command under the authority of Army Regulation 210-10. Accordingly, on 15 September 1969 the two requests to distribute the July and August issues of "Bragg Briefs" were denied.

On 17 September 1969 I received an application for permission to distribute the September edition of the "Bragg Briefs". (Exhibit C of Plaintiffs' Affidavit) After a review of this issue it was my opinion that permission must be denied because its contents constituted a clear danger to the loyalty, discipline, and morale of the military personnel of my command. Accordingly, on 22 September 1969 permission to distribute the September issue of the "Bragg Briefs" was denied.

On 22 October 1969 this command received a request to distribute the November issue of "Bragg Briefs". (Exhibit BB of Plaintiffs' Affidavit) After careful review, I denied the request on 27 October 1969 because its contents presented a clear danger to the loyalty, discipline, and morale of my command.

I personally reviewed each issue of the "Bragg Briefs" and gave consideration to its impact on the effectiveness of my command, the accomplishment of its mission, and on the loyalty, discipline, and morale of the servicemen at Fort Bragg. Review of the four editions of "Bragg Briefs" was made in accordance with the standards published in the Army Regulation 210-10, Change 1 dated 10 March 1969 (Attachment 1), and in the 9 April 1969 edition of the Judge Advocate Legal Service (Department of the Army Pamphlet 27-69-9) (Attachment 2), subsequently reiterated in Department of Defense Directive 1325.6, dated 12 September 1969 (Attachment 3). Among other things I considered the fact that one of the primary missions of Fort Bragg is to prepare individuals and

units for assignment to South Viet Nam and that the "Bragg Briefs" considered were directed specifically to Ft. Bragg soldiers with the express purpose of encouraging them to organize in opposition to the war in Viet Nam. After review, and upon reflection it was, and is, my opinion that permission to distribute the four copies of "Bragg Briefs" should be denied because their contents constitute a clear danger to the loyalty, discipline and morale of the military personnel of my command.

JOHN J. TOLSON
Lieutenant General, USA

Sworn to and subscribed before me this Third day of November 1969.

PAUL G. MALLONEE
LTC. JAGC

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1164

RICHARD A. YAHR, ET AL., PETITIONERS

v.

STANLEY R. RESOR, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24–26) is reported at 431 F. 2d 690. The order of the district court denying petitioners' motion for a preliminary injunction (Pet. App. 27–32) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1970. By order of Mr. Justice Harlan dated November 17, 1970, the time for filing a petition for a writ of certiorari was extended to and including December 24, 1970, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

417-526—71

QUESTION PRESENTED

Whether the district court acted within the proper scope of its discretion in refusing to issue a preliminary injunction prohibiting the Army from barring the distribution on the Fort Bragg Military Reservation of a newspaper published by soldiers.

STATEMENT

Petitioners, servicemen stationed at Fort Bragg, North Carolina, sought permission on several occasions to distribute a newspaper they published, known as "Bragg Briefs." Permission was denied by the Commanding General of Fort Bragg.

Army Regulation AR 210–10, Par. 5–5, provides that:

> * * * [I]nstallation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

Where a publication does "present a clear danger to the loyalty, discipline, or morale of troops at his installation," the regulation authorizes an installation commander to delay its dissemination on the base (App. 29). The regulation also permits him to require prior approval of any distribution on base other than at regularly established and approved

outlets (App. 30). Such prior approval is required on Fort Bragg. Fort Bragg Regulation 210–23 (App. 30).

The Commanding General of the XVIII Airborne Corps and of Fort Bragg, Gen. Tolson, refused to permit distribution of Bragg Briefs. This action was then brought. In opposition to plaintiffs' motion for a preliminary injunction, the government submitted an affidavit of Gen. Tolson, in which he stated that in denying permission for the distribution of Bragg Briefs,

> * * * I considered the fact that one of the primary missions of Fort Bragg is to prepare individuals and units for assignment to South Viet Nam and that the "Bragg Briefs" considered were directed specifically to Ft. Bragg soldiers with the express purpose of encouraging them to organize in opposition to the war in Viet Nam. After review, and upon reflection it was, and is, my opinion that permission to distribute the four copies of "Bragg Briefs" should be denied because their contents constitute a clear danger to the loyalty, discipline and morale of the military personnel of my command.

The district court refused to grant a preliminary injunction, concluding that "the evidence fails to show a probability of plaintiffs' ultimate success on the merits, nor does it clearly establish that plaintiffs are being denied a constitutional right" (App. 31).

The court of appeals affirmed the denial of a preliminary injunction and remanded the case for further proceedings. The court stated (App. 26):

Constitutional questions should be decided only when unavoidable, and this is particularly true when the issue is raised on appeal from an interlocutory order. When the case is heard on the merits, the parties should brief, and the district judge should decide, the appropriate standard of review of the Commanding General's decision. The district court should also find which articles, specifically, constituted a basis for the decision to exclude and why the Commanding General deemed them "a clear danger to the loyalty, discipline and morale" of the military personnel at Fort Bragg. Only upon a complete record supplying these facts can it be determined whether the Commanding General had a proper basis for denying the applications, whether he acted consistently with Army directives, and, ultimately, whether his actions deprived appellants of their First Amendment rights.

ARGUMENT

The present interlocutory posture of this case makes it an inappropriate vehicle for a ruling on the constitutional questions petitioners raise. See also the government's opposition to the petition in *Dash v. Resor*, No. 1163, this Term. Neither the district court nor the court of appeals has finally ruled on the legality of the Army's action; and the "complete record" which the court of appeals has required to be developed on remand should provide a more com-

plete background for such a ruling. For now, the questions petitioners seek to raise are premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
L. PATRICK GRAY, III,
Assistant Attorney General.
ROBERT V. ZENER,
BARBARA ELLWOOD,
Attorneys.

FEBRUARY 1971.

SUPREME COURT, U. S.

FILED

Supreme Court of the United States

October Term, 1970

No. 1164

RICHARD A. YAHR, JOSEPH D. MILES, HAL W. NOYES, BRUCE PATTERSON, JOSEPH P. CURTIS, ROBER MALL, DONALD PERKINS, FREDERIK PENN, JACK K. RILEY, DONALD C. MIEHLE, CRAIG G. LEWIS, MICHAEL FLAHERTY, EDWARD V. COX, FELTON C. DONNELL, LEW D. BRICE, WILLIAM K. KIMMEL, DAVID G. SHULMAN, and LAWRENCE J. MILANO,

Petitioners,

—against—

STANLEY R. RESOR, as Secretary of the Army, Department of Defense, and Lt. General JOHN J. TOLSON, Commanding General of Fort Bragg, North Carolina,

Respondents.

PETITIONERS' REPLY BRIEF

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Laughlin McDonald
17 S. Circle Drive
Chapel Hill, North Carolina

Attorneys for Petitioners

David Rosenberg
Dorian Bowman
Of Counsel

Supreme Court of the United States

October Term, 1970

No. 1184

RICHARD A. YAHR, et al.,

Petitioners,

—against—

STANLEY R. RESOR, Secretary of the Army, et al.,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

Respondents' glib approach ill befits the important First Amendment questions presented by this case. Like the courts below, respondents are unable to point to a single piece of evidence in the record supporting the Army's conclusion that distribution of *Stagg Briefs* at Fort Bragg PX's and libraries will, or is even likely to, endanger base security and discipline. Nor do respondents cite any evidence demonstrating a rational, let alone compelling, basis for the Army's discriminatory imposition of a system of prior censorship upon petitioners' newspaper while commercial publications and radio and television broadcasters have free access to the base. Cf. *Fortune Society v. McGinnis*, 319 F. Supp. 901, 905-906 (S.D.N.Y. 1970).

Respondents appear to have forgotten that publication and distribution of a newspaper is involved here. We cannot reject the nagging belief that if, instead of *Stars and Stripes*, *Life* Magazine or the Washington Post were barred from Ft. Dix, New Jersey because the commander, as in this case, believed they encouraged servicemen to organize against the Vietnam war, preliminary relief would unquestionably have been granted by the courts below or the Solicitor General would have conceded error.

The overriding public interest in the dissemination of ideas by and between servicemen, and not the narrow standards governing private litigation applied by the courts below, measure the propriety and need for preliminary injunctive relief in this case, as in any other involving freedom of speech and press. *Carroll v. Princess Anne*, 393 U.S. 175, 181-182; *Blount v. Rizzi*, ___ U.S. ___ (decided January 14, 1971); *Freedman v. Maryland*, 380 U.S. 51; cf. *Heckler Co. v. Sanders*, 321 U.S. 321, 331. Under these special standards, the Army must sustain a heavy burden of proving that petitioners' speech should be suppressed, preliminarily. And that burden can be satisfied solely upon evidence, not suppositions. On this record, however, only the latter appears.

Respondents argue that the court below correctly upheld the denial of a preliminary injunction because the legal standards and factual basis for ultimate relief had not been completely developed. But on respondents' logic, preliminary injunctions would never be granted, least of all in First Amendment cases. Thus even assuming, *arguendo*, that there remain issues to be tried and argued before final judgment can be entered in this case, preliminary relief is still appropriate and, on this record, required. Cf. *Semmco Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197 (2d Cir. 1970); Comment, 71 Col. L. Rev. 165 (1971).

Stars and Stripes has been published monthly for approximately two years. Not a single edition of the newspaper has been approved by the Army for distribution on base. We have

no doubt that the Army will demand a full trial on the contents of each edition, as they have on the present four. If future editions are subject to the same preliminary restraint as the four involved here, then obviously ultimate success on the merits in each case will be a victory in principle, but too late to be meaningful in any practical sense.

CONCLUSION

Because the lower courts denied preliminary relief — so essential to the freedom of press — under standards which do not recognize the preferred position of petitioners' speech and because these courts will continue to treat present and future editions of *Bragg Briefs* in a similar manner, we submit that the issues in this case are both ripe and substantial, and the petition for certiorari should be granted.

Respectfully submitted.

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

Laughlin McDonald
17 South Circle Drive
Chapel Hill, North Carolina

Attorneys for Petitioners.

David Rosenberg
Dorian Bowman
Of Counsel

Dated, March 10, 1971